No. 15953

United States Court of Appeals

FOR THE NINTH CIRCUIT

CARLIN CONSTANTINE VENUS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Southern Division.

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JURISDICTION

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Southern District of California, Southern Division. (R. 19-22) The District Court had jurisdiction under Title 18, § 3231, United States Code. The indictment charged an offense against the Universal Military Training and Serv-

ice Act (50 U.S.C. App. § 462). (R. 3-4) This Court has jurisdiction of this appeal under Rule 37 (a) (1) and (2) of the Federal Rules of Criminal Procedure because the notice of appeal was filed in the time and manner required by law. (R. 21-22)

STATUTE INVOLVED

Section 12 (a) of the Universal Military Training and Service Act (50 U.S.C. App. § 462 (a)) provides:

> "... Any ... person ... who ... refuses ... service in the armed forces ... or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title ... shall upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. ... "

REGULATIONS INVOLVED

Section 1602.4 of the Selective Service Regulations (32 C.F.R. § 1602.4) reads as follows:

> "*Delinquent.*—A 'delinquent' is a person required to be registered under the selective service law who fails or neglects to perform any duty required of him under the provisions of the selective service law."

Section 1632.1 of the Selective Service Regulations (32 C.F.R. § 1632.1) reads as follows:

> "*Order to Report for Induction.*—Immediately upon determining which men are to report for induction, the local board shall prepare for each man an Order to Report for Induction (SSS Form No. 252) in duplicate. The date specified for reporting for induction shall be at least 10 days after the date on which the

Order to Report for Induction (SSS Form No. 252) is mailed, except that a registrant classified in Class I-A or Class I-A-O who has volunteered for induction may be ordered to report for induction on any date after he has so volunteered if an appeal is not pending in his case and the period during which an appeal may be taken has expired. The local board shall mail the original of the Order to Report for Induction (SSS Form No. 252) to the registrant and shall file the copy in his Cover Sheet (SSS Form No. 101)."

Section 1632.14 of the Selective Service Regulations (32 C.F.R. § 1632.14) reads as follows:

"*Duty of Registrant to Report for and Submit to Induction.*—(a) When the local board mails to a registrant an Order to Report for Induction (SSS Form No. 252), it shall be the duty of the registrant to report for induction at the time and place fixed in such order. If the time when the registrant is ordered to report for induction is postponed, it shall be the continuing duty of the registrant to report for induction upon the termination of such postponement and he shall report for induction at such time and place as may be fixed by the local board. Regardless of the time when or the circumstances under which a registrant fails to report for induction when it is his duty to do so, it shall thereafter be his continuing duty from day to day to report for induction to his local board and to each local board whose area he enters or in whose area he remains."

Section 1641.1 of the Selective Service Regulations (32 C.F.R. § 1641.1) reads as follows:

"*Notice of Requirements of Universal Military Training and Service Act.*—Every person shall be deemed to have notice of the requirements of title I of the Universal Military Training and Service Act, as

amended, upon publication by the President of a proclamation or other public notice fixing a time for any registration. This provision shall apply not only to registrants but to all other persons."

Section 1641.2 of the Selective Service Regulations (32 C.F.R. § 1641.2) reads as follows:

"*Failure to Take Notice.*—(a) If a registrant or a person required to present himself for and submit to registration fails to perform any duty prescribed by the selective service law, or directions given pursuant thereto, within the required time, he shall be liable to fine and imprisonment under section 12 of title I of the Universal Military Training and Service Act, as amended.

"(b) If a registrant or any other person concerned fails to claim and exercise any right or privilege within the required time, he shall be deemed to have waived the right or privilege."

Section 1641.3 of the Selective Service Regulations (32 C.F.R. § 1641.3) reads as follows:

"*Communication by Mail.*—It shall be the duty of each registrant to keep his local board advised at all times of the address where mail will reach him. The mailing of any order, notice, or blank form by the local board to a registrant at the address last reported by him to the local board shall constitute notice to him of the contents of the communication, whether he actually receives it or not."

Section 1642.1 of the Selective Service Regulations (32 C.F.R. § 1642.1) reads as follows:

"*Regulations Governing Delinquents.*—Delinquents, as defined in section 1602.4 of this chapter shall be governed by the provisions of this part and such other

provisions of the Selective Service Regulations as are not in conflict therewith."

Section 1642.2 of the Selective Service Regulations (32 C.F.R. § 1642.2) reads as follows:

> "*Continuing Duty.*—When it becomes the duty of a registrant or other person to perform an act or furnish information to a local board or other office or agency of the Selective Service System, the duty or obligation shall be a continuing duty or obligation from day to day and the failure to properly perform the act or the supplying of incorrect or false information shall in no way operate as a waiver of that continuing duty."

Section 1642.15 of the Selective Service Regulations (32 C.F.R. § 1642.15) reads as follows:

> "*Continuous Duty of Certain Registrants To Report for Induction.*—Regardless of the time when or the circumstances under which a registrant fails or has failed to report for induction pursuant to an Order to Report for Induction (SSS Form No. 252) . . . it shall thereafter be his continuing duty from day to day to report for induction to his own local board, . . . "

STATEMENT OF CASE

Appellant was charged by indictment filed August 8, 1957, among other things, as follows: "the defendant was classified in Class I-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on November 8, 1955, in San Diego County, California, . . . " (R. 3-4) He pleaded not guilty. (R. 15)

The case proceeded to trial before a jury on November 15, 1957. (R. 15) The Selective Service cover sheet of the registrant was received into evidence as Government's Exhibit 1. (R. 25, 59) Appellant Venus registered on Sep-

tember 15, 1948. He filled out and returned his classification questionnaire to the local board on May 24, 1949. [4-10][1] He was classified I-A on July 11, 1950. [11] On October 27, 1950, he was classified III-A. [11] On November 13, 1951, he requested a Special Form for Conscientious Objector. [14] He filed this form on November 19, 1951. [30-51] He thereafter was mailed a revised Special Form for Conscientious Objector on December 11, 1951, which he filled out and returned on December 17, 1951. [11, 52-58] On January 9, 1952, the local board classified him I-A-O, making him liable for noncombatant military service in the armed forces. [11] Following a personal appearance on February 11, 1952, he was reclassified in II-A. [11] He was again classified by the local board in I-A on September 24, 1952, [11] but was reclassified to II-A on October 15, 1952. [11] The local board placed him in Class I-A on January 7, 1953. [11] He timely appealed. [76]

His file was forwarded by the appeal board to the Department of Justice for investigation, hearing and recommendation on February 19, 1953. [80] Following the investigation and hearing, the Department of Justice recommended to the appeal board that appellant be denied the conscientious objector status. [83-88] The appeal board thereupon classified him in I-A on April 9, 1954. [90] On May 4, 1954, he was ordered to report for induction on May 19, 1954. [12, 89] He reported for but declined to submit to induction. [91]

On May 26, 1954, the local board commanded him to appear before it for an informal interview on June 3, 1954. [93] He appeared and informed the board that he was opposed to both combatant and noncombatant military service because of his religious training and beliefs, that he was now a minister and his goal was to become a full-time

[1] Figures appearing in brackets refer to the penciled underlined numbers on material in registrant's cover sheet, being Government's Exhibit 1.

minister or pioneer. He informed the board that he would not perform military training and service. [96-97]

On June 7, 1954, appellant wrote a letter to the local board informing it of a change of address. The letter stated: "At this time I wish to inform you of my departure from San Diego to Modesto, Calif. because of secular employment. The Federal Bureau of Investigation I have notified, when in Los Angeles after induction procedures. My new address is (Same Employer) 1431 10th St. Modesto, Calif., but can be reached within one or two days at my San Diego address." [147] (R. 34, 46, 62)

The Director of Selective Service determined that appellant should be prosecuted. [150] While the case was pending in the court, the local board, on November 2, 1954, sent appellant's file to the Assistant Deputy State Director at Los Angeles, as requested. [157] The Assistant Deputy State Director, on November 26, 1954, sent the file to the State Director at Sacramento. [162] The file was returned to the Assistant Deputy State Director at Los Angeles on January 4, 1955. [166] However the file was not returned to the local board until July, 1955. [166]

Appellant, in February, 1955, while the file was still out of the hands of the local board, notified the local board of a change of address. He mailed a postcard to the local board. He testified that the postcard read as follows:

> " 'This is to notify you of my new home address. You can contact me at this address at all times. Please send all mail to this new address as from the date of February'—I believe it was February 20th. I am not accurate on that, but it was a February date. I said, 'as of February 20th.' I will say that. I would. 'Please send all mail to this new address: 1120-30th Street, San Diego.' And I signed it, my name: 'Thank you, Carlin Venus.' " (R. 64)

This was at a time when appellant was helping his parents move from one place to another in San Diego. He

was undecided as to whether he was going to continue to live in Modesto or stay in San Diego. (R. 62-63) The new address that he gave to the local board, 1120 30th Street, San Diego, by the postcard above quoted, was his parents' home. (R. 63)

He actually deposited the postcard, notifying the local board of the change of address, in the United States mails. (R. 63-64) The postcard was mailed by him in Los Angeles, where he was temporarily staying. (R. 76) There was a friend with him at the time the postcard was mailed, who went with him to the substation to mail the card. (R. 82) His friend saw him put the postcard in the mail box at the substation in Los Angeles at Sixth and Alvarado Streets. (R. 99) The postcard was a Government-stamped postcard. (R. 100) The friend testified at the trial that Venus, whom he accompanied to the post office, told him "he had to mail a card to his draft board to give them his parents' address to make sure they had a permanent address, because we were working different places." (R. 101-102)

On previous occasions Venus had communicated with the local board by registered mail and several times he used registered mail to notify the board of a change of address. (R. 76-77, 79-80, 91-92) This time, however, he did not register the postcard because he said "I was just dropping the draft board a line to let them know of my new address." (R. 78)

The record shows that there were five or ten communications by Venus with the local board that were not certified or registered mail. (R. 92-93)

The selective service file shows that it was not in the hands of the local board at the time that appellant mailed the February, 1955, change of address. The "Minutes of Actions by Local Board and Appeal Board" shows: "7-11-55 File and SSS Form No. 1 received from So. Area Hdqs. hh", which is the first time the local board had the file after

November 2, 1954. [12, 157, 166] The file was out of the possession of the local board for eight months.

On August 4, 1955, the United States Attorney informed the local board that the indictment was dismissed because appellant had not been furnished with a copy of the Department of Justice recommendation, and permission was given to reprocess appellant. [17]

On September 1, 1955, the local board reclassified appellant to I-A and he was so informed on September 2, 1955. [12] Appellant testified he did not receive such notice of classification. (R. 81) On October 28, 1955, an order to report for induction on November 8, 1955, was mailed to appellant at 1431 10th Street, Modesto, California. [12, 72] It was not mailed to his current address. (R. 33) This address appearing on the order and on the envelope in which it was enclosed, was not mailed to 1120 30th Street, San Diego, the address which appellant had given to the local board in the postcard mailed from Los Angeles. (R. 76) The wrong address appearing on the order and on the envelope in which it was enclosed, was taken from the letter written by appellant to the local board June 7, 1954, notifying the local board that he was moving to Modesto. On October 28, 1955, the date that the order was mailed to the old address in Modesto, the building at such address had been torn down and the property turned into a parking lot six months earlier. (R. 104-105) Up until February, 1955, Venus worked at the gymnasium located at such address. He was employed as a physical training instructor and a massager. He worked and slept at the place of employment. (R. 62, 83)

The clerk testified that she prepared the original and carbon copy of the order to report for induction, as well as the envelope in which the order was enclosed. (R. 30) She said the original order "was folded and placed in the envelope together with instructions and mailed to the registrant at this address typed on the order for induction." (R. 30) She said that she initialed the carbon copy

with the initials of the member who signed the original. (R. 30) As to the mailing out of notices, the record shows:

"Q. And is it your personal duty to mail out all the notices of any nature, or do you delegate some of your responsibilities to other clerks in the office?

"A. Some of my work is done by others, yes. . . .

"Q. Do you personally mail out all the notices of classification and orders to report, or do you delegate some of that specific responsibility to another clerk?

"A. Well, some of the work is done by others, but the orders for induction, those I usually send out myself if I am in the office. . . .

"Q. And on this occasion did you put this particular letter in that box?

"A. I can't say that I put it in the mail box. I put it in the box in our office, mail box in our office.

"Q. Who picks the mail up from the mail box in your office?

"A. Usually one of us clerks takes the mail over and puts it in the box before or at the close of business for the day.

"Q. You have a specific receptacle in your office then where you put all your out-going mail?

"A. Yes, that is correct. . . .

"Q. Then, in other words, you didn't actually mail this notice; you merely put it in the box within your office to be mailed?

"A. Yes. I don't recall if I mailed it that day or not. . . .

"Q. And on this particular day all you recall doing is putting it in the box within the office?

"A. Yes.

"Q. But that is not a government mail box; that is just—

"A. Well, it is too, because we are a government office. So in a way it is a government mail box. We are responsible for it to see that it gets in the box.

"Q. It is not a regular postal box from which a governmental employee would come and get mail out of it?
"A. No." (R. 38, 39, 39-40, 40, 40-41)

The local board never attempted to locate Venus at the San Diego address of his parents, mentioned by Venus to the local board in his letter of June 7, 1954. (R. 88-89) After the date of preparing the induction order the local board did not communicate with Venus and he heard nothing from the board. (R. 87) The first he learned about the classification and the order being mailed was when he was interviewed by an F.B.I. agent at the Physical Services establishment in Los Angeles in April, 1956. (R. 65-66) Venus told the F.B.I. agent that he had not received the card sent to him or the order to report for induction in September and October, 1955. (R. 66) Venus notified the local board on April 9, 1956, of a change of address, and that he had been a full-time minister since August, 1955, and was married December 31, 1955. He asked for his latest classification and any other information he should have. [32] On August 21, 1956, he wrote another letter to the local board asking why the board had not replied to his previous letter. [29] On August 29, 1956, the United States Attorney wrote Venus that he was delinquent because he had failed to advise the local board of his change of address and that he was also delinquent for failure to report for induction. [28]

On September 4, 1956, Venus wrote a letter to the local board, with a carbon copy to the United States Attorney, that he had notified the local board on June 7, 1954, that he could be reached at the home of his parents, 1120 30th Street, in San Diego; that in February, 1955, he had mailed a postcard to the local board notifying it of his new address in San Diego, 1120 30th Street; that mail sent to his parents always reached him; that he had always complied with every instruction; and that he had notified the local board each time he changed his address. He told the local board he had not received the induction notice and if he had he

would have reported, but would not have submitted, just as he did in May 1954. [26]

On October 2, 1956, the Assistant United States Attorney telephoned the local board and stated that it had been decided not to prosecute Venus, because there was doubt as to whether the report for induction and the last I-A classification card had been mailed to the correct address. [19]

On November 14, 1956, Venus notified the local board of a new address. [16] On April 25, 1957, Venus called at the local board and had someone with him to help him copy part of his draft board file. [15] He testified that he ultimately went to the local board in April, 1957, "according to instructions that the F.B.I. agent gave me." (R. 81) He said the F.B.I. agent told him to write to the local board and he did so in April, 1956. (R. 81, 91)

Concerning his letter in April, 1956, he said "I thought that, because I didn't receive any induction notice, that they would send me another induction notice, if anything, and then I could appeal that. Or I didn't even receive a 1-A Classification, let alone an induction notice. But after not hearing from the board—I had written them, and then I had gotten a letter from another office." (R. 80-81) He said he thought he deserved another notice to report for induction, but because he didn't get it he went to the board office. (R. 68)

The clerk testified that during the visit to the office in April, 1957, Venus asked her what could be done about his case and that she told him that she "couldn't tell him what to do." (R. 51) Venus testified that he asked her whether he could appeal or if there was anything he could do and the clerk informed him that the case was out of the board's hands and in the hands of the district attorney and "not in their jurisdiction anymore." (R. 71) She said that Venus told her if he had received the order he would have reported but would have refused to submit to induction. (R. 51) She said she showed him a copy of the induction order. (R. 31)

Venus testified that he asked the clerk, "Didn't you think it strange that I didn't report, since I have reported and been completely cooperative for four or five years?" And that she said she did think it strange because he had been very cooperative. (R. 69)

Venus said that when the clerk told him she assumed that he got the order he insisted that he had not received it. (R. 70) She also testified that during the visit he asked her whether the board had ever received the postcard written by him and mailed to the local board showing the change of address and she informed him that if the board had received it, it would have been in the file. (R. 51)

The clerk testified that Venus told her that it undoubtedly appeared unusual to her that he did not report as he had in response to a previous order to report. (R. 59-60) She said that it did appear strange to her but she thought he had received the order and would report. (R. 60) Venus testified that if he had received the order he would have reported. (R. 74-75) He had reported in May, 1954, and refused induction because he was an ordained minister. (R. 75, 79) Venus said that he did not have an intent to willfully and knowingly fail to report. (R. 75)

QUESTIONS PRESENTED AND HOW RAISED

I.

Whether the undisputed evidence shows that the appellant, as a matter of law and fact, did not refuse to report for induction as charged in the indictment, either (1) "knowingly" or (2) on the date alleged in the indictment.

This question was raised by grounds 1, 2 and 3 of the motion for judgment of acquittal. (R. 106)

II.

Whether the undisputed evidence shows that the order to report for induction was not actually deposited in the

United States mails, either by putting it in a mail box or putting it in the post office, and therefore is not a valid order.

This question was raised by an unnumbered ground in the motion for judgment of acquittal. (R. 113-125)

III.

Whether the undisputed evidence shows that, even if mailed, the order to report for induction was mailed to the wrong address and therefore is not a valid order.

This question was not specifically raised in the motion for judgment of acquittal but is implicitly raised in grounds 1, 2 and 3 of the motion for judgment of acquittal. (R. 103) This question should be passed on, even if considered not raised, under *Franks* v. *United States,* 216 F. 2d 266, at page 270 (9th Cir. 1954).

IV.

Whether 32 C.F.R. § 1641.3 (Selective Service Regulations), as construed and applied, is unconstitutional because its provisions about constructive notice denies appellant due process of law, contrary to the Fifth Amendment to the United States Constitution.

This question was raised by grounds 4 and 5 of the motion for judgment of acquittal. (R. 106-107)

V.

Whether 32 C.F.R. § 1642.2 (Selective Service Regulations), as construed and applied, is unconstitutional because its provisions as to continuing duty to comply with the order to report for induction, denies appellant due process of law, contrary to the Fifth Amendment to the United States Constitution.

This question was raised by grounds 6 and 7 of the motion for judgment of acquittal. (R. 107)

VI.

Whether the district court committed error in charging the jury that the appellant had a continuing duty to report after November 8, 1955.

This question was raised by exception taken to the charge of the court. (R. 146, 151)

VII.

Whether the district court committed error in refusing to give defendant's requested instruction number 12.

This question was raised by the request to charge and the exception on the refusal to so charge. (R. 10, 152)

VIII.

Whether the district court committed error in refusing to give defendant's requested instruction number 13.

This question was raised by the request to charge and the exception on the refusal to so charge. (R. 11, 152)

IX.

Whether the district court committed error in refusing to give defendant's requested instruction number 14.

This question was raised by the request to charge and the exception on the refusal to so charge. (R. 11, 152)

X.

Whether the district court committed error in refusing to give defendant's requested instruction number 15.

This question was raised by the request to charge and the exception on the refusal to so charge. (R. 11, 152)

XI.

Whether the district court committed error in refusing to give defendant's requested instruction number 18.

This question was raised by the request to charge and the exception on the refusal to so charge. (R. 12, 153)

XII.

Whether the district court committed error in refusing to give defendant's requested instruction number 19.

This question was raised by the request to charge and the exception on the refusal to so charge. (R. 12, 153)

XIII.

Whether the district court committed error in refusing to give defendant's requested instruction number 20.

This question was raised by the request to charge and the exception on the refusal to so charge. (R. 13, 153-154)

XIV.

Whether the district court committed error in refusing to give defendant's requested instruction number 21.

This question was raised by the request to charge and the exception on the refusal to so charge. (R. 13, 154)

XV.

Whether the district court committed error in refusing to give defendant's requested instruction number 23.

This question was raised by the request to charge and the exception on the refusal to so charge. (R. 13-14, 154)

XVI.

Whether the district court committed error in refusing to give defendant's requested instruction number 25.

This question was raised by the request to charge and the exception on the refusal to so charge. (R. 14, 154-155)

SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motion for judgment of acquittal duly made at the close of all the evidence. (R. 106-130, 132)

II.

The district court erred in failing to grant the motion for judgment of acquittal duly renewed after the verdict of the jury. (R. 17-18, 19, 164-196)

III.

The district court erred in failing to grant the motion for a new trial duly made after the verdict of the jury. (R. 16-17, 19)

IV.

The district court erred in charging the jury as follows:

"You are instructed that in order to find the defendant guilty as charged in the Indictment, you must find . . . That the defendant did on such date [November 8, 1955], and at all times thereafter, knowingly failed to report for induction. (R. 145)

This charge was made over the exceptions of the appellant as follows:

> "I feel that this is an erroneous statement of the law and can only be corrected by deleting the words: ' * * * and at all times thereafter * * * '. It is the defendant's contention that he only had one duty, namely, to report on November 8, 1955, as charged in the indictment, and that any question of what he did thereafter is not competent under the charge of the indictment.
>
> "I request of the Court that the instruction be re-

read to the jury deleting that particular clause." (R. 151)

V.

The district court erred in charging the jury as follows:

"The selective service regulations which are passed pursuant to law provide that 'When it becomes the duty of a registrant * * * to perform an act * * * the duty or obligation shall be a continuing duty or obligation from day to day and the failure to properly perform the act * * * shall in no way operate as a waiver of that continuing duty.'

"In this connection, if you find that the defendant knowingly failed to report for induction at any time between November 8, 1955, and August 8, 1957, the date of the return of the Indictment, you may find him guilty of the offense charged." (R. 146)

This charge was made over the exceptions of the appellant as follows:

"I believe the whole instruction should be withdrawn from the jury, because it charges the defendant with a duty to report on November 8, and thereafter that he had a continuing duty to report. I feel that this is an erroneous conception of the law, that he had a duty to report, particularly in light of the fact that if the jury believes him, that he never received an order or an order was never given." (R. 151)

VI.

The district court erred in refusing to give defendant's requested instruction number 12, which reads as follows:

"Before there arises a presumption of fact that the addressee of a letter has received it, it must first be proved that it was properly addressed, but no such presumption arises unless it appears that the person

to whom sent resided at the place to which it was mailed." (R. 10)

The refusal of the court was excepted to as follows:

"I believe that under the facts of this case the defendant mailed a letter. The jury is entitled to know that there is a presumption that the letter he mailed was received; it was properly addressed. There has been no such instruction to the jury. The jury can well find, if they were instructed, that there is a presumption that the letter had been mailed, it was duly stamped and addressed, and that the parties live at that address; that the local board receive[d] it; and that, therefore, they had that letter and didn't send his order to report to his last known address." (R. 152)

VII.

The district court erred in refusing to give defendant's requested instruction number 13, which reads as follows:

"The presumption of receipt from mailing cannot be based upon the presumption, unsupported by direct evidence, that a public officer performed his or her duty in mailing a notice." (R. 11)

The refusal of the court was excepted to as follows:

"I object to the Court's failure to give Defendant's Number 13, in that there must arise in the jurors' minds some type of presumption from the fact that the testimony stated the usual order of mailing in the government's office. However, this instruction should be given to show that there was no direct evidence that a public officer performed his duty and, therefore, the presumption that the mail was taken care of regularly should fall." (R. 152)

VIII.

The district court erred in refusing to give defendant's requested instruction number 14, which reads as follows:

> "Where the fact of notice is made by statute to rest on the presumption that a letter mailed was received, there must be clear proof of the mailing." (R. 11)

The refusal of the court was excepted to as follows:

> "I object to the Court's failure to give Defendant's Number 14, in that in this case there is a great question of whether or not the mail was actually sent." (R. 152)

IX.

The district court erred in refusing to give defendant's requested instruction number 15, which reads as follows:

> "To establish mailing of a letter containing a notice, in the absence of direct evidence, there must be proof of an invariable custom or usage in an office of depositing mail in a certain receptacle, that the letter in question was deposited in such receptacle and, in addition, there must be testimony of the employee whose duty it was to deposit the mail in the post office that he or she either actually deposited that mail in the post office or that it was his or her invariable custom to deposit every letter in the usual receptacle." (R. 11)

The refusal of the court was excepted to as follows:

> "I object to the Court's failure to give . . . Defendant's Number 15 instructs the jury on the law pursuant to the Rice case as to what is necessary for the government to establish to perform its duty in making out a case of mailing a notice." (R. 152)

X.

The district court erred in refusing to give defendant's requested instruction number 18, which reads as follows:

> "If you should find that the defendant has not been given due notice to report for induction pursuant to the Selective Service Regulations, then you are bound to find the defendant did not have a continuing duty to report." (R. 12)

The refusal of the court was excepted to as follows:

> "Under the defendant's theory of the case, the jury should have been instructed that if no new notice was given, then defendant never had a duty to report." (R. 153)

XI.

The district court erred in refusing to give defendant's requested instruction number 19, which reads as follows:

> "The defendant is being charged with failure to report for induction on November 8, 1955, in San Diego County, California, and any evidence concerning his failure to report after said date shall be disregarded by you in determining whether or not the defendant has performed the acts required of him under the Universal Military Training and Service Act." (R. 12)

The refusal of the court was excepted to as follows:

> "Under the defendant's theory of the case, he has only been charged with a failure to report on November 8, 1955, and that any evidence concerning his failure to report thereafter was not charged in the indictment and was not proper for the jury to consider." (R. 153)

XII.

The district court erred in refusing to give defendant's requested instruction number 20, which reads as follows:

> "The defendant is being charged with failure to report for induction and not for failure to submit to induction, and therefore any evidence bearing on the question of whether or not defendant intended to submit to induction is to be disregarded in determining whether or not the defendant had any criminal intent on the charge of failure to report." (R. 13)

The refusal of the court was excepted to as follows:

> "Defendant contends that whether or not he would have ultimately submitted to induction has no bearing upon the question of whether or not he would have reported; and the jury should have been so instructed in order to make up that distinction. . . . The defendant is charged—this is Defendant's Number 20—with failure to report for induction and not for failure to submit to induction. And, therefore, any evidence bearing on the question of whether or not defendant intended to submit for induction is to be disregarded in determining whether or not the defendant had any criminal intent on the charge of failure to report." (R. 153-154)

XIII.

The district court erred in refusing to give defendant's requested instruction number 21, which reads as follows:

> "If you should find that an order to report for induction was not mailed to the defendant's last known address, then you must return a verdict of not guilty." (R. 13)

The refusal of the court was excepted to as follows:

> "Under the defendant's theory of the case, if the jury should find that an order to report was never

mailed to his last known address, then they must find him not guilty." (R. 154)

XIV.

The district court erred in refusing to give defendant's requested instruction number 23, which reads as follows:

> "You shall not consider the defendant's failure to report after November 8, 1955, as an offense since anything he did after that date has no bearing on the question of whether or not he failed to report on November 8, 1955. The defendant cannot have a continuing obligation to report if you find that he never received an order to report. The only time the defendant would have a continuing obligation to report would be if he had received an order to report. The defendant would have to be charged specifically with a failure to observe this continuing duty to report. The indictment in this case does not so charge the defendant." (R. 13-14)

The refusal of the court was excepted to as follows:

> "Under his theory of the case, again, anything that took place after November 8, 1955, had no bearing on the question before the jury as framed by the indictment. In that particular instruction the jury is informed, or should have been informed, that the defendant didn't have an obligation to report if he never received the order to report as specified in the regulations." (R. 154)

XV.

The district court erred in refusing to give defendant's requested instruction number 25, which reads as follows:

> "If you should find that the defendant contacted his Local Board upon learning that he had been reported delinquent, and said Board, through its agents or em-

ployees, informed the defendant that there was nothing that they could do, but that the matter was up to the United States Attorney's Office, then you should find that the plaintiff has waived its rights in requiring the defendant to make any further report." (R. 14)

The refusal of the court was excepted to as follows:

"I believe that this instruction should have been given to the jury, so that they would know that if the defendant actually went to the local board and the Board, through its agent or employees, failed to inform the defendant what to do or did inform him that there was nothing they could do, that the government has put themselves in the position of waiving any right to have the defendant to continue to report by their own actions; and they should be estopped from prosecuting him or attempting to convict him on this continuing duty to report theory. By their own acts they have put him in a position where he failed to report because of things actually told to him by the government's board or the clerk of that board." (R. 154-155)

ARGUMENT

ONE

The undisputed evidence shows that the appellant, as a matter of law and fact, did not refuse to report for induction as charged in the indictment, either "knowingly" or on the date alleged in the indictment.

The undisputed evidence shows that the appellant did not know that he had been ordered to report for induction. The local board order was mailed to the wrong address. Because the building was torn down and was no longer being used, there was no such address to which the order could be delivered. The evidence shows that the local board had been notified of the change of address.

The evidence shows that the appellant did not learn of

the induction order until he was interviewed by an agent of the Federal Bureau of Investigation in the early part of 1956. This was several months after the order had been issued. The appellant, on the instructions of the F.B.I. agent, promptly sent a letter to the local board, but he did not get an answer. He received no answer to a second letter addressed to the local board. He finally went to the local board office in April, 1957, and inquired of the clerk as to what he might do. The clerk told him that it was out of the hands of the local board and was in the hands of the United States Attorney. She apparently knew of no 'continuing duty' on appellant's part. She said, "I couldn't tell him what to do." (R. 51)

In this circumstance, there is no knowing violation of the law, and on the date charged in the indictment especially. There was no willful refusal to comply with the order. Appellant testified that had he received the order he would have reported but would have refused to submit, as he had previously done in 1954. There is no justification, therefore, for any conclusion upon the evidence that there was a knowing violation of the law.

The term "knowingly," as used in Section 12 (a) of the Universal Military Training and Service Act (50 U.S.C. App. § 462 (a)), is synonymous with "willfully." It means prompted by bad faith or with evil intent or for an illegal purpose. It means without legal justification. If Venus had legal justification or reasonable grounds for belief he was legally justified in not reporting for induction it cannot be said he illegally, knowingly and unlawfully failed to perform a duty required of him under the Act.

Directly in point with this case, and controlling here, is *Graves* v. *United States,* 252 F. 2d 878, 883, (9th Cir. 1958), wherein this Court held that the facts, similar to those here, failed to show a knowing failure, neglect or refusal to perform a statutory duty. The language of this Court in that case is applicable here: "The appellant was charged with knowingly failing and neglecting to report

for induction on October 13, 1955, pursuant to a notice to report on that date. He cannot be convicted on this indictment of a failure or neglect to perform a different duty at a different time. *Cole* v. *Arkansas,* 333 U.S. 196, 68 S. Ct. 514, 92 L. Ed. 644."—See also *Heikkinen* v. *United States,* 355 U.S. 273, 78 S. Ct. 299, 302 (1958).

Silverman v. *United States,* 220 F. 2d 36 (8th Cir. 1952), is inapplicable to the facts here because in that case there was sufficient evidence to warrant a jury in finding that appellant actually received the notice to report for induction.

Appellant here relies on *United States* v. *Murdock,* 290 U.S. 389, 394-396 (1933), to support his contentions under this point. There the defendant was convicted of willfully and knowingly failing to supply information as to his income. The grounds of the refusal were that he believed he was exempt on the items inquired about and that the Constitution guaranteed him the right to decline to incriminate himself. This reasonable belief of exemption, which was erroneous, and the fear that he might incriminate himself, entitled the jury to consider that if he had good faith he could not be convicted of willfully refusing to give the information.

Where an act or omission must be knowingly and willfully done, not only a knowledge of the act is required, but a determination that accused had a specific intent to do it. (*United States* v. *Murdock,* 290 U.S. 389, 394-396 (1933); *Bentall* v. *United States,* 262 F. 744) The well-known presumption that a person intends the natural consequences of his acts is rebuttable, but a specific intent is an essential element of the offense charged.—*Laws* v. *United States,* 66 F. 2d 870.

If the Court were invoking the presumption that men intend the natural and probable consequences of their acts, its rulings would be in error. The presumption of wrongful intent based on the natural consequences of one's words or acts is not a conclusive presumption but a rebuttable

one and this rebuttal may take the form of testimony by the defendant himself that he intended no such results; and an instruction that accused could not contradict the assumption flowing from his act was held to be reversible error. (*Bentall* v. *United States*, 262 F. 744; *Laws* v. *United States*, 66 F. 2d 870) Such a presumption is not applicable in the presence of positive proof that defendant had a different intent. (*McDonald* v. *United States*, 9 F. 2d 506; *Blumenthal* v. *United States*, 88 F. 2d 522) A presumption that men intend the natural consequences of their acts is not applicable in the face of affirmative proof that defendant had a different intent. An instruction that if the defendant committed certain acts of violence knowing their effect, intent would be presumed, was held to be reversible error. (*McDonald* v. *United States*, 9 F. 2d 506) It has been authoritatively held that a defendant may by his uncorroborated testimony rebut the presumption that one is presumed to intend the natural and probable consequences of his act, in fact that it may be easily rebutted.—*Weiss* v. *United States*, 122 F. 2d 675; cert. denied 314 U.S. 687 (1941).

Willfulness "is something over and above the mere intent to do a thing." (*United States* v. *Saglietto*, 41 F. Supp. 21) Where an offense is criminal only when knowingly and willfully done, it is not only necessary to prove knowledge of the act but that it was done with a bad intent. (*Bentall* v. *United States*, 262 F. 744) When an act or omission is a crime only if it is willfully and knowingly done, a specific wrongful intent is of the essence of the offense; that is, there must not only be knowledge of the existence of the obligation but a wrongful intent to evade it.—*Hargrove* v. *United States*, 67 F. 2d 820.

Criminal intent has been defined as "a mind at fault before there can be a crime"; as such it is an essential fact to be proved in the establishment of the guilt; though Congress may define an offense without unlawful intent, a statute will not be so construed unless legislative intent

clearly so shows.—*Masters* v. *United States,* 42 App. D.C. 350; *United States* v. *Burroughs*, 65 F. 2d 796, affirmed in part 290 U.S. 534 (1934).

Thus, when a specific intent is a part of the crime, the existence of such intent must be proved as a fact like any other fact in the case, and it is not presumed from the commission of an unlawful act. (*Transportation Company* v. *Parkersburg,* 107 U.S. 691 (1882); *Savitt* v. *United States,* 59 F. 2d 541; *United States* v. *Burnett,* 53 F. 2d 219; *United States* v. *Houghton*, 14 F. 544; *Herrman* v. *Lyle,* 41 F. 2d 759) A criminal intent is necessary unless the statute otherwise provides.—*Nosowitz* v. *United States,* 282 F. 575.

"There can be no crime, large or small, without an evil mind. In other words, punishment is a sequence of wickedness, without which it cannot be."—*Bishop on Criminal Law*, §§ 287, 288.

It was said in *Felton* v. *United States,* 96 U.S. 699, 702 (1878): "Doing or omitting to do a thing knowingly and willfully, implies not only a knowledge of the thing, but a determination with a bad intent to do it or omit doing it. 'The word "willfully,"' says Chief Justice Shaw, 'in the ordinary sense in which it is used in statutes, means not merely "voluntarily," but with a bad purpose.' 20 Pick. (Mass.) 220. 'It is frequently understood,' says Bishop, 'as signifying an evil intent without justifiable excuse.' Crim. Law, vol. i. sect. 428."

Venus' situation is very similar to that involved in *United States* v. *Hoffman*, 137 F. 2d 416 (1943). There the court held that if a registrant, through conditions over which he had no control, failed to report as ordered he would not be guilty of a criminal violation of the law. Compare *United States* v. *Graham*, 128 F. 2d 811.

The case of *Graves* v. *United States*, 252 F. 2d 878, at pages 881, 882 and 883, is directly in point on both issues presented by this point: (1) no knowing violation of the

law, and (2) no continuing duty as a basis of conviction after the date alleged in the indictment.

It is respectfully submitted that this Court should hold, as a matter of law and fact, that the appellant did not knowingly refuse to report for induction at any time, either on the date alleged in the indictment or at a later date, and that this Court should further hold that the appellant cannot be convicted of a failure to report for induction on any date after November 8, 1955, the date alleged in the indictment, because there is no allegation in the indictment that there was a continuing duty on the part of appellant to report for induction from and after such date.

TWO

The undisputed evidence shows that the order to report for induction was not actually deposited in the mails and therefore there is no valid order supporting the indictment.

The clerk in this case was the only witness that testified. She said that she prepared the order to report for induction and the envelope in which it was sealed. She also testified that the envelope was placed in a box maintained in the office where all outgoing mail was kept for mailing. But neither she nor any other employe of the local board testified that the envelope and order was actually deposited in the United States mails. As far as the evidence goes the envelope addressed to the appellant (to the wrong address) winds up in the outgoing mail receptacle in the local board office. After that there is no proof that it was ever physically deposited in the United States mails. There is no evidence that the bundle in which it was presumably tied was mailed in the United States mails. There is no evidence of custom sufficient to overcome the presumption of innocence.

It is true that the minutes of the local board opposite the date "OCT 28 1955" bears the stamp "SSS FORM 252 MAILED". [12] But the word "MAILED" appearing in

the minutes is a mere conclusion in view of the direct evidence of the clerk contradicting the entry in the minutes. It is a stamp that was placed in the minutes after the order was prepared, sealed in the envelope and placed in the box used for outgoing mail in the local board office. But it was not placed on it after actual mailing. The entry in the minutes is therefore not conclusive and is not evidence of the physical act of mailing in the United States mails which must be proved before it can be assumed that the appellant actually received the order.

The entry was impeached and disputed by the testimony of the clerk, which failed to show that the order was actually mailed.

This case is distinguishable from *Johnson* v. *United States*, 126 F. 2d 242 (8th Cir. 1942), where the clerk of the local board testified that he actually mailed the classification card and also that he orally informed the registrant concerning the classification.

In *Rosenthal* v. *Walker,* 111 U.S. 185, 193 (1884), it was held that the presumption of delivery of a letter does not arise until the letter is "proved to have been either put into the post office or delivered to the postman, . . ."

In *Henderson* v. *Carbondale Coal and Coke Co.*, 140 U.S. 25, 37 (1891), the same holding was made. The Court said: "This is not a conclusive presumption, and it does not even create a legal presumption that such letters were actually received, . . ." The Court went on to say: "But no such presumption arises unless it appears that the person addressed resided in the city or town to which the letter was addressed; . . ."

In *Schutz* v. *Jordan,* 141 U.S. 213, 220 (1891), Justice Brewer said: "So while the mailing of a letter creates an inference, raises a presumption that the party to whom it was addressed received it in due course of mail, and thus acquired knowledge of the matters stated therein, yet such presumption is one of fact, not of law. It is not conclusive, but subject to control and limitation by other facts."

See also *Crude Oil Corp.* v. *Comm'r of Internal Revenue*, 161 F. 2d 809, 810 (10th Cir. 1947); *Central Paper Co.* v. *Comm'r of Internal Revenue*, 199 F. 2d 902, 904-905 (1952); *Arkansas Motor Coaches* v. *Comm'r of Internal Revenue*, 198 F. 2d 189, 191 (1952).

In *United States* ex rel. *Helmecke* v. *Rice*, 281 F. 326, 332-336 (S. D. Tex. 1922), it was proved there was a uniform custom to prepare all letters in the mail. The court held that there was substantial evidence sufficient to find that the order was mailed, but here there is no positive proof about any custom of depositing in the mails. Also the evidence of the clerk is that she did not know whether the envelope was actually deposited in the mails: "I can't say that I put it in the mail box." (R. 39) She said that she could not recall if she mailed it. (R. 40)

A much stronger distinction exists. Let it now be stated. This is a criminal case. The burden is upon the Government to prove that the envelope was actually mailed. The Government has wholly failed to call any witness employed in the local board office whose duty it was to actually mail the envelope. The Government witness said she did not do it and that it was not her duty. The failure to call such assistant clerk of the board as a witness gives rise to a presumption that the evidence would be unfavorable to the Government. The rule is that it would be favorable to the appellant if some other employe of the board were called. The failure to call the person whose responsibility it was to deposit the office mail in the post office or United States mail box is a fatal missing link in the Government's evidence.

United States ex rel. *Helmecke* v. *Rice*, 281 F. 2d 326, is distinguishable from this case in that this is a criminal case. That case was a habeas corpus application, a civil proceeding. The burden was upon the petitioner in that case to prove the lack of mailing. Here the burden is upon the Government to prove positively that the order had been actually deposited in the United States mails. The

Government wholly failed to prove that it had or any circumstances that would give rise to the actual mailing of the order.

There is no presumption of legality in administrative proceedings where there is a prosecution in a criminal case based upon such administrative proceedings. The reason is that the presumption of innocence rebuts and repels the presumption of regularity in administrative proceedings.

In *Jones on Evidence in Civil Cases,* Fourth Edition, Bancroft-Whitney Co., San Francisco, 1938, Volume 1, § 101, it is said: "Generally speaking, no legal presumption is so highly favored as that of innocence; ordinarily substantially all other presumptions yield to it in case of conflict." There the author cites *Dunlop* v. *United States,* 165 U.S. 486 (1897), and *Edwards* v. *United States,* 7 F. 2d 357. It is later stated in this section, fourth paragraph, that the presumption of innocence prevails over a large number of other presumptions.

Notwithstanding *Koch* v. *United States,* 150 F. 2d 762, 763 (4th Cir. 1945), and *United States* v. *Fratrick,* 140 F. 2d 5, 7 (7th Cir. 1944), to the contrary, appellant says that the presumption of innocence in criminal proceedings makes inapplicable such presumption of regularity.

It is respectfully submitted that there is no valid order supporting the indictment because the Government wholly failed to supply the vital link of proof of actual deposit of the envelope containing the order into the United States mail box or the post office.

THREE

The undisputed evidence shows that if the order was mailed it was directed to the wrong address and therefore there is no valid order supporting the indictment.

The undisputed evidence shows that Venus sent a postcard, addressed to the local board, through the mails. The evidence shows he actually deposited it in the United States

mails in February, 1955, in which he informed the local board of his new address. Since the local board file was away from the board at the time it must be conclusively presumed that the postcard was actually mailed to the local board.—*Rosenthal* v. *Walker,* 111 U.S. 185, 193 (1884); *Henderson* v. *Carbondale Coal and Coke Co.,* 140 U.S. 25, 37 (1891); *Schutz* v. *Jordan,* 141 U.S. 213, 220 (1891); *Crude Oil Corporation* v. *Comm'r of Internal Revenue,* 161 F. 2d 809, 810 (10th Cir. 1947); *Central Paper Co.* v. *Comm'r of Internal Revenue,* 199 F. 2d 902, 904-905 (1952); *Arkansas Motor Coaches* v. *Comm'r of Internal Revenue,* 198 F. 2d 189, 191 (1952).

Based upon these cases appellant proved that the postcard was actually deposited in the United States mails, which gives rise to the conclusive presumption, in the absence of any contradictory evidence, that the postcard was received by the board.

The local board clerk testified that the postcard was not received, but she said that if it had been received it would be in the file. The testimony of the clerk may be completely disregarded because the file was out of the possession of the local board at the time the card was mailed in February, 1955. It was not in the possession of the board from November 2, 1954, to July, 1955. It had been sent to the Assistant Deputy State Director in Los Angeles on November 2, 1957. [157] The file shows it was received at Los Angeles on November 3, 1954. [157] Appellant's cover sheet was not returned to the local board until July 1, 1955. [12, 166] So how can it be said that the card was ever put in the file in view of this obvious administrative irregularity?

On July 1, 1955, the local board was informed by the State Director that the prosecution had been dismissed. [167] The local board received the file back from Los Angeles on July 11, 1955. [12] Since the file was out of the possession of the local board when the postcard was re-

ceived from the appellant in February, 1955, obviously the postcard could not be placed in the file when the card was received in the mails. The Court cannot speculate as to what disposition was made of the postcard by the clerk, or what disposition would ordinarily be made of such correspondence when the file is out of the possession of the local board, because there was no evidence given by the Government in such a situation.

In the case of In re *Abramson*, 196 F. 2d 261 (3rd Cir. 1952), it was stated that the draft board action was invalid because the letter addressed to the registrant had been directed to the wrong address and not in accordance with the latest change of address given to the local board by the registrant. The court said:

> "In logic, nothing to the contrary appearing, we think this rational conception of mailing as including proper addressing should be viewed as pervading the body of Selective Service regulations so that when Section 623.30 employs the phrase 'mails him' it means 'mails [properly addressed to] him.' Moreover, while administrative accommodation may dictate that rights of registrants normally be terminated before actual receipt of an induction notice, we think it only fair, and not burdensome on government, that a cut off stated in terms of mailing depend upon administrative accuracy in directing the communication. If substantial error appears in the mailing address the communication should not be regarded as mailed to the addressee, at least until the time of delivery. And there was such error here. For it is not to be presumed that a letter addressed to the wrong postal area in the country's largest metropolis will proceed in normal course of post to its intended destination.
>
> "Our conviction that we have rightly construed the regulation in question is reinforced by the fact that in dealing with a variety of legal problems courts rather uniformly have reasoned that normal legal con-

sequences attach to the mailing of a communication only when it is properly addressed. *E.g.,* Restatement, Contracts, §§ 64-67 (1932) (acceptance of an offer); Note, 155 A.L.R. 1279 (1945) (notice in tax foreclosure proceedings); Uniform Negotiable Instruments Act, §§ 105, 108 (notice of dishonor); Uniform Commercial Code, § 1-201 (notices and writings)."

This point was impliedly raised in grounds 1, 2 and 3 of the motion for judgment of acquittal. In event, however, the Court concludes that the point was not raised, then the Court is respectfully requested to consider this point because it is plain error within the meaning of Rule 52 (b) of the Rules of Criminal Procedure, as this Court said in *Franks* v. *United States*, 216 F. 2d 266, at page 270.

It is respectfully submitted that this Court should conclude that there is no valid order supporting the indictment because the order to report for induction was mailed to the wrong address.

FOUR

Sections 1641.3 and 1642.2 of the Selective Service Regulation (32 C.F.R. §§ 1641.3; 1642.2) are unconstitutional because, as construed and applied, they deny appellant due process of law, contrary to the Fifth Amendment to the United States Constitution.

This point combined questions IV and V of "Questions Presented and How Raised," supra, this brief. They were raised by grounds 4, 5, 6 and 7 of the motion for judgment of acquittal. (R. 106-107)

Section 1641.3 of the Selective Service Regulations provides for constructive notice of all orders and other actions taken by the local board. Section 1642.2 imposes on the registrant a continuing duty to comply with any orders made by the local board.

The undisputed evidence shows that Venus did not re-

ceive the order to report for induction and that he did not learn about it until April, 1956, when he was contacted by the F.B.I. agent. Then he promptly wrote a letter to the local board inquiring about his status. This was followed up by another letter several months later complaining about the failure of the local board to respond. In April, 1957, he visited the local board and was there told by the clerk that the entire matter was out of the hands of the local board and she could give him no information since it was within the exclusive jurisdiction of the United States Attorney.

The first he knew about the outstanding order to report for induction was in April, 1956, and he took the only steps that he could take, and which the F.B.I. agent instructed him to take, by writing to the local board. When the local board did not respond he followed this up with another letter, and finally with a visit to the local board where he was given a "run around," by the clerk's saying it was out of the jurisdiction of the local board.

The indictment charged Venus with having failed to report for induction on November 8, 1955. He had no knowledge of this order and attempted, unsuccessfully, to get information from the local board as to what he should do. Being informed merely that it was out of the hands of the local board and within the exclusive jurisdiction of the United States Attorney, he took no further action to report.

Under all the facts and circumstances of this case, Section 1641.3, which imposes constructive notice upon appellant of the outstanding order to report for induction, and Section 1642.2, which commands him to comply with the outstanding order from day to day, of which he had no knowledge, and also which the local board did not give him an opportunity to comply with by reporting thereafter, constitute a deprivation of procedural due process of law, contrary to the Fifth Amendment to the United States Constitution.

The Regulations, as construed and applied to the facts

and circumstances of this case, have denied Venus of his rights guaranteed by the Fifth Amendment to due process of law contrary to the holding of the United States Supreme Court in *Tot* v. *United States,* 319 U.S. 463 (1943). —*Manley* v. *Georgia,* 279 U.S. 1 (1929); *Benton* v. *United States,* 232 F. 2d 341 (D.C. Cir. 1956); *McFarland* v. *American Sugar Refining Co.,* 241 U.S. 79 (1916); *Government of the Virgin Islands* v. *Torres,* 161 F. Supp. 699 (D.C. V.I. 1958) (Maris, Circuit Judge, presiding).

It is respectfully submitted that Sections 1641.3 and 1642.2 of the Selective Service Regulations (32 C.F.R. §§ 1641.3; 1642.2), as construed and applied to the particular circumstances of this case, are unconstitutional.

FIVE

The district court committed reversible error in charging the jury that the appellant had continuing duty to report after November 8, 1955, up to and including August 8, 1957, the date of the return of the indictment, and that if the jury found that he did not so report, it could convict.

The district court charged the jury that it could convict the appellant if he knowingly failed to report for induction at all times after November 8, 1955. (R. 145) The district court also thereafter charged that, pursuant to 32 C.F.R. § 1642.2, there was a continuing duty from day to day on the part of the appellant to report for induction. The jury was informed that if the appellant failed to report at any time between November 8, 1955, and August 8, 1957, the date of the indictment, it would be justified in finding the appellant guilty. (R. 145, 146)

The jury returned a verdict of guilty, based upon this instruction. The instruction of the trial court and the verdict of the jury constitute a construction and application of 32 C.F.R. § 1642.2 to the particular facts in this case so as to deny the appellant of his rights upon the trial of the case, contrary to the Fifth Amendment to the United

States Constitution, in that he has been denied due process of law.

The appellant has been convicted upon a failure to do something of which he had no notice. The jury has been permitted to convict him upon speculation and no evidence of guilt by knowingly refusing to report for induction.

Appellant wrote inquiring about his status and visited the local board and orally requested to be informed as to what he should do. The representative of the local board informed him that the matter was out of the hands of the local board and there was nothing to tell him.—*Tot* v. *United States,* 319 U. S. 463 (1943); *Heikkinen* v. *United States,* 355 U. S. 273, 78 S. Ct. 299, 302, 303; *Graves* v. *United States,* 252 F. 2d 878, 882-883 (9th Cir. 1958).

In the face of this evidence and as a result of the court's charge—which was clearly erroneous—appellant was found guilty in violation of his rights to due process of law. The court's charge was erroneous and requires a reversal of the judgment of conviction.

It is respectfully submitted that this Court should conclude that the trial court committed reversible error in charging the jury that appellant had a continuing duty to report after November 8, 1955, up to and including the date of the indictment.

SIX

The district court committed reversible error in failing to give defendant's requested instructions numbers 12, 13, 14, 15 and 21, requiring the jury to find that there was an actual performance of public duty to deposit the envelope, containing the order, in the United States mails before it could be presumed that (1) the local board received appellant's card and (2) the appellant received the order to report for induction.

The testimony of appellant and his supporting witness establishes that the appellant mailed to the local board a

postcard notifying it of the change of address in February, 1955. At that time the cover sheet (draft file) of the appellant was out of the hands of the local board. It has been heretofore submitted that under all the circumstances the Court should hold as a matter of law and of fact that the local board received the postcard and that it was charged with notice of the correct address of the appellant. It has been also heretofore argued that the Court should hold as a matter of law that the local board mailed the order to report to induction to the wrong address, because of being charged with a receipt of the notification of the change of address.

In the event, however, that the Court does not hold that the local board is so charged with notice as a matter of law, then it is here submitted that the question of whether the local board had actual notice of the change of address was an issue of fact. It was a theory of defense that should have been submitted to the jury by the trial court. In defendant's requested instruction number 12, the district court was asked to charge that there arises a presumption of fact that an addressee of a letter has received it if it has been proved to have been properly addressed, and when it appears that the person to whom it was sent "resided at the place to which it was mailed." (R. 10)

The exception to the charge of the court in refusing to give this instruction was that under the facts of the case his communication had been mailed and that it was up to the jury to say whether or not the notice was received by the local board. (R. 152). It was the responsibility of the trial court, therefore, to submit to the jury whether the local board had notice of the change of address. This issue of fact and defensive theory was not submitted to the jury as requested by the appellant.

It was a question of fact for the determination of the jury as to whether the clerk or some other employe of the local board actually deposited the envelope containing the order in the United States mails.

The credibility of the clerk, as prosecuting witness, was involved. There was a question of fact to be determined by the jury on this issue as to whether there was a regularity of the administrative proceedings followed in the handling of the order, the envelope and the mailing of them.

Defendant's requested instruction number 12 was upon a subject matter not covered in the court's charge. The court was requested to put to the jury that it must first find that the card mailed by the appellant was properly addressed and that the addressee actually resided at the place addressed before there could be presumption of delivery. The proof showed that the local board, the addressee, still had the same address. It was for the jury to say if the board actually received the card. Exception was taken to the court's failure to give this instruction. (R. 10, 152)

Defendant's requested instruction number 13 was upon a subject matter not covered in the court's charge. It requested the court to charge the jury that it must first find that the public officer involved actually performed the duty imposed by law in the handling of the mail before it could be presumed that the order was received by appellant. Exception was taken to the court's failure to give this instruction. (R. 11, 152)

Defendant's requested instruction number 14 was upon a subject matter not covered in the court's charge. It requested the court to charge the jury that there must be proof of the actual mailing of the envelope containing the order before there is a presumption of receipt of the mail by appellant. Exception was taken to the court's failure to give this instruction. (R. 11, 152)

The defendant's requested instruction number 15 was upon a subject matter not covered in the court's charge. It requested the court to charge the jury that there must be proof of actual depositing in the United States mails before a presumption of receipt arises. Exception was taken to the court's failure to give this instruction. (R. 11, 152)

The defendant's requested instruction number 21 was

upon a subject matter not covered in the court's charge. It requested the court to charge the jury that if the order was not mailed to the last known address of appellant, he should be acquitted. Exception was taken to the court's failure to give this instruction. (R. 13, 154)

As has been heretofore pointed out, it has been held that there must be actual proof of mailing before any presumption of receipt arises as a basis for a jury to find that the order was actually received.—See *Rosenthal* v. *Walker*, 111 U.S. 185, 193 (1884); *Henderson* v. *Carbondale Coal and Coke Co.*, 140 U.S. 25, 37 (1891); *Schutz* v. *Jordan*, 141 U.S. 213, 220 (1891); *Crude Oil Corporation* v. *Comm'r of Internal Revenue*, 161 F. 2d 809, 810 (10th Cir. 1947); *Central Paper Co.* v. *Comm'r of Internal Revenue*, 199 F. 2d 902, 904-905 (1952); *Arkansas Motor Coaches* v. *Comm'r of Internal Revenue*, 198 F. 2d 189, 191 (1952).

It was a question for the jury to determine as to whether the card advising of a change of address or the order was actually mailed. But nowhere in the court's charge is this subject covered. Yet there was an issue for the jury to decide as to whether (1) the local board mailed the order to the wrong address, or (2) the appellant ever at any time actually received or had any knowledge of the existence of the order to report for induction.

It is true that the court charged that it was necessary to find that the appellant "knowingly failed" to report for induction. (R. 145) But he went on to add that knowledge could be proved by "circumstantial evidence". (R. 145) Nowhere thereafter was the appellant's theory of the case submitted to the jury.

The charge of the court was definitely one-sided and biased in favor of the Government except for the formal parts of the charge about reasonable doubt, burden of proof, and similar stock instructions. The entire charge of the court to the jury on the material facts of the case consisted only of the Government's requested instructions numbers 1, 2, 3, 4, 5 and 7. No other theory was submitted to the

jury. Compare the court's charge (R. 141-148) with the Government's requested instructions. (R. 5-9) It will be observed that the only issues submitted to the jury were those covered in the Government's instructions.

At no point in the court's charge did he submit to the jury any of the issues requested by the appellant. Compare the court's charge (R. 134-149) with the requested instructions of the appellant. (R. 10-14) Note also that the appellant took exceptions to the charge of the court in failing to give such requested instructions. (R. 148-155)

SEVEN

The district court committed reversible error in failing to give defendant's requested instructions numbers 18, 19, 23 and 25, which called upon the court to submit to the jury the issue about whether the appellant had a continuing duty to report.

Defendant's requested instruction number 18 was upon a subject matter inadequately covered in the court's charge. It requested the court to charge the jury that if it should find that Venus had not been given due notice to report for induction, then the jury would be bound to find that there was no continuing duty. Exception was taken to the court's failure to give this instruction. (R. 12, 153)

Defendant's requested instruction number 19 was upon a subject matter inadequately covered in the court's charge. It requested the court to charge the jury that since the indictment charged the appellant with failure to report on November 8, 1955, any evidence concerning his failure to report after that date must be disregarded by the jury. Exception was taken to the court's failure to give this instruction. (R. 12, 153)

Defendant's requested instruction number 23 was upon a subject matter inadequately covered in the court's charge. It requested the court to charge the jury that there was no continuing duty to report if the jury found that he never

received the order to report, especially since the indictment did not charge appellant with a continuing duty to report. Exception was taken to the court's failure to give this instruction. (R. 13-14, 154)

Defendant's requested instruction number 25 was upon a subject matter inadequately covered in the court's charge. It requested the court to charge the jury that if it found that the board, through its agents or employees, informed appellant (when he contacted the board on learning he was reported as a delinquent) that there was nothing the board could do because the matter was up to the United States Attorney, that the jury should find that the Government had waived its rights in requiring appellant to make any further report. (R. 14, 154-155)

It was a question of fact for the jury to determine as to whether the appellant actually knowingly refused to comply with the continuing duty of reporting for induction. He gave testimony about his going to the local board and inquiring about what he should do. The clerk herself testified that she was unable to tell him what to do. She said she informed him that the matter was out of the jurisdiction of the local board and in the hands of the United States Attorney. This testimony was not contradicted by the clerk.

The very fact that the clerk did not take the stand to deny this testimony must be accepted by this Court as true. The very least to be said is that it was a question for the jury to determine whether or not this was true. That being the case issues relating to whether or not the appellant knowingly violated this continuing duty should have been submitted to the jury. This was not done by the trial court.

It has heretofore been pointed out in the previous point that the charge of the court was entirely one-sided, ex parte for the Government. It submitted none of the issues of fact appearing in the defendant's requested instructions to the jury. The failure and refusal of the court to give the requested instructions constitutes reversible error.

The court touched upon the matter of continuing duty

of the appellant in his charge to the jury. (R. 145, 146) This charge was identical to the Government's requested instructions numbers 4 and 7. The court did not cover any of the appellant's issues as to the continuing duty. The appellant's views as to the lack of continuing duty were not submitted to the jury. The one-sided ex parte governmental charge by the trial court to the jury was prejudicial and did not fairly and judicially submit to the jury the vital issues as to whether appellant knowingly and willfully refused to comply with the alleged continuing duty on his part to report for induction after November 8, 1955, and up to the date of the return of the indictment, if such dates are legally material dates under the indictment.—See *Graves* v. *United States,* 252 F. 2d 878 (9th Cir. 1958).

EIGHT

The district court committed reversible error in refusing to give defendant's requested instruction number 20, which called upon the court to submit to the jury that the intent of appellant to refuse to submit to induction—as distinguished from refusal to report for induction—was irrelevant and immaterial.

Defendant's requested instruction number 20 asked the court to charge the jury that the appellant was charged in the indictment with a failure to report for induction and his intent to refuse to submit to induction in event he reported could not be considered by the jury in determining whether he had criminal intent in not reporting for induction.

There was evidence that was developed at the trial by the Government that appellant, even if he would have reported, would not have submitted to induction. This evidence was undoubtedly prejudicial. Without some instruction from the court to guide the jury it may have greatly harmed him before the jury on the issue of knowingly re-

fusing to report for induction, the only charge in the indictment.

Appellant was charged with failure to report for induction. The jury undoubtedly took a cavalier attitude toward the defense of the case of not knowingly refusing to report for induction. The jury probably considered that it was useless to acquit on a charge of failure to report, when the appellant would have to be re-indicted for refusal to submit to induction. In other words, if he would later on be guilty of another offense, he may as well be convicted for this charge of which he was not guilty.

In such a critical situation, as was developed in the evidence, it was the responsibility of the district court to give the appellant's theory on his intent not to submit to induction as being no evidence of an intent not to report for induction. The Court should bear in mind that previously appellant had reported and refused to submit. He was entitled to have the jury consider the case on the basis of the charge, to-wit, failure to report for induction and not convict him because he had intended not to submit if he had reported. This refusal of the district court constituted reversible error.

The appellant was entitled to have his affirmative defenses considered by the jury. The trial court did not give the jury any opportunity to consider anything except the Government's theory of the case.

CONCLUSION

It is submitted that for the reasons above stated, this Court ought to reverse and remand the case to the trial court with instructions to grant the motion for judgment of acquittal and to render and enter a judgment of acquittal as prayed for in the motion; or, in the alternative, this Court ought to reverse and remand the case to the trial court for a new trial because of the errors committed by

the trial court (1) in the charge to the jury and (2) in refusing to give the defendant's requested instructions upon the appellant's theory of the case, which was never put to the jury.

Respectfully,

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